[Cite as *State v. Moore*, 2010-Ohio-3305.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92829

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTWANE MOORE

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTION AFFIRMED;
REVERSED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-509389

BEFORE: Celebrezze, J., Rocco, P.J., and Jones, J.

RELEASED: July 15, 2010

JOURNALIZED:

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Antwane Moore, appeals from the denial of his motion to suppress arguing the evidence presented at the suppression hearing was so inconsistent that the trial court could not resolve the motion in the state's favor. After a thorough review of the record and based on the following case law, we affirm the decision of the trial court, but remand for resentencing.

{¶ 2} On April 7, 2008, appellant was a passenger in a rented car driven by co-defendant, Lamar Petty. The two pulled into a gas station on Chester Avenue, near downtown Cleveland. Plain-clothed police detectives from the Cleveland Metropolitan Housing Authority ("CMHA") approached the vehicle.

{¶ 3} Several minutes before, officers from CMHA had received a tip that a late-model, black Chevrolet HHR would be pulling into a BP station on Chester Avenue between East 30th Street and the entrance to I-90 at a specific time that day.[1] The tipster explained that the occupants of the car would be at the gas station to engage in a drug transaction with another party.

{¶ 4} Detectives Clinton Ovalle and Thomas Azzano of the CMHA Crime Suppression Unit, along with other officers from CMHA, observed a black Chevrolet HHR pull into the gas station where officers were waiting.

[1] There was conflicting testimony about whether the tip was from an anonymous source or a known confidential informant.

The two officers testified they pulled their car behind the HHR, leaving a distance of approximately 50 feet. They exited the car as two other CMHA detectives pulled up and exited their vehicle. Detectives Ovalle and Azzano gave differing versions of the events of that day, but each stated that upon approaching the vehicle, with its windows rolled down, they observed a large, clear plastic bag containing what they later confirmed to be approximately 63 grams of crack cocaine. The officers tried to initiate an arrest of the individuals in the Chevrolet HHR, but the driver backed the vehicle away from the gas pumps and toward the street. Heavy traffic and the quick action of the CMHA detectives stopped the vehicle from turning onto Chester Avenue, and the pair were ordered out of the vehicle and arrested. Eight more individual plastic bags were discovered in the arm rest on the driver's side of the vehicle, each containing a small amount of crack cocaine.

{¶ 5} Appellant was indicted on April 17, 2008 on charges of one count of possession of drugs in violation of R.C. 2925.11, one count of drug trafficking in violation of R.C. 2925.03, and one count of possession of criminal tools in violation of R.C. 2923.24; all counts included forfeiture specifications.

{¶ 6} At a hearing on appellant's motion to suppress evidence, held September 9, 2008, Det. Ovalle testified that he walked up to the driver's-side door to investigate the tip he had received. He stated that he did not have his gun drawn, nor did the detectives block appellant's car from leaving the

gas station at that time. Det. Ovalle testified that he intended to see if the occupants of the car would engage in a consensual encounter. Det. Ovalle stated that, upon arriving at the open window of the driver's door, with Det. Azzano behind him, he observed a large bag of crack cocaine in plain view on the floorboards of the car between the legs of the driver and the passenger. He began to order the two occupants out of the car when the car was put in reverse in an attempt to flee.

{¶ 7} Det. Azzano testified that he approached the HHR without drawing his gun. Upon reaching the open driver's-side window, before making any statements to the occupants, he observed a large bag of crack cocaine in plain view on the center console of the car between the two passengers. Det. Azzano testified that Det. Ovalle was behind him. He then ordered the driver to turn off the car and exit the vehicle. The driver put the car in reverse and attempted to leave the gas station.

{¶ 8} The inconsistencies in the testimony of the two detectives were explained by Sergeant Paul Styles, who testified that it was Det. Azzano and not Det. Ovalle who had authored the incident report generated for this arrest. Through a computer mix-up, Det. Ovalle's name was on the cover sheet of the report as though he had authored it. It was later shown that Det. Azzano actually authored the report.

{¶ 9} The trial court found that the testimony of the two detectives was consistent in important respects and denied appellant's motion to suppress.

{¶ 10} On December 3, 2008, appellant pled no contest to the charges against him, including the forfeiture specifications contained within the indictment. He was sentenced to three years on each of the drug counts, to run concurrently, and six months for the possession of criminal tools. The trial court also ordered that $525 in cash found on appellant, as well as any interest he had in the Chevrolet HHR, be forfeited to the Cleveland Police Department.

Law and Analysis

{¶ 11} Appellant claims the trial court erred in overruling his motion to suppress the evidence and cites three assignments of error:

{¶ 12} I. "The court erred when it denied the motion to suppress and for the return of illegally seized property."

{¶ 13} II. "A due process violation occurred, particularly when the accused not only expressly requested the court to fully comply with Rule 12(F), but actually takes written exceptions to the court's failure to do so."

{¶ 14} "III. "The court erred when it failed to address the return of the seized property aspect of the defendant's motion to suppress."

{¶ 15} For clarity of discussion, we will address appellant's second assignment of error first.

I. Criminal Rule 12(F)

{¶ 16} Appellant submitted a motion to the trial court requesting that it set forth the factual determinations upon which its decision to deny his

motion to suppress were predicated. The trial court failed to provide any further information.

{¶ 17} Crim.R. 12(F) mandates that "[w]here factual issues are involved in determining a motion, the court shall state its essential findings on the record." This rule does not imbue a defendant with the power to force a trial court to issue separate factual findings when ruling on a motion to suppress if the court's reasoning is set forth in the record and the record as a whole provides an appellate court with sufficient basis for review. *State v. Ogletree*, Cuyahoga App. No. 86285, 2006-Ohio-448, ¶15; *State v. Harris*, Cuyahoga App. No. 85270, 2005-Ohio-2192, ¶18; *State v. King* (1999), 136 Ohio App.3d 377, 381, 736 N.E.2d 921.

{¶ 18} The trial court ruled that, "[r]elative to the issue of whether or not the officers involved were properly deputized sheriff's deputy employees authorized to arrest, that issue seems to have been resolved by the State's Exhibit 2. Certainly the issue is one that could be revisited by use of the subpoena power by the defendants in the trial stage of this case.

{¶ 19} "As to the motion itself, the Court finds that mere inconsistency in the testimony is not enough to render the central issue of the case unavailable for judgment. Whether Det. Ovalle was the first to the vehicle or whether Det. Azzano was the first to the vehicle, each testified that they looked inside the vehicle and saw in plain view a large amount of crack cocaine that was Plaintiff's or State's Exhibit 1, that they both testified that

they saw that State's Exhibit 1 in plain view and notwithstanding the testimony of [appellant] that he did not see it, he's uncontradicted, as such the motion is denied at this time."

{¶ 20} From the transcript and these conclusions, it is clear that the trial court found that the detectives approached the vehicle without seizing it or the occupants, that the officers observed a large amount of crack cocaine in the vehicle, and that they then had probable cause to arrest appellant based on those observations.

{¶ 21} Those are the underlying factual determinations made by the trial court, and they are sufficient to allow this court to review that determination. *State v. Lucious*, Cuyahoga App. No. 92196, 2009-Ohio-4880, ¶13-14. Therefore, appellant's second assigned error is overruled.

II. Motion to Suppress

{¶ 22} In appellant's first assignment of error, he claims that the trial court erred in denying his motion to suppress and for the return of seized property.

{¶ 23} "In a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve questions of fact and evaluate witness credibility. A reviewing court is bound to accept those findings of fact if supported by competent, credible evidence. However, without deference to the trial court's conclusion, it must be determined independently whether, as a matter of law, the facts meet the appropriate legal standard."

(Internal citations omitted.) *State v. Curry* (1994), 95 Ohio App.3d 93, 96, 641 N.E.2d 1172.

{¶ 24} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. The analysis for a search requires a two-step inquiry where probable cause is required and, if it exists, a search warrant must be obtained unless an exception applies. *State v. Moore*, 90 Ohio St.3d 47, 2000-Ohio-10, 734 N.E.2d 804. "If the state fails to satisfy either step, the evidence seized in the unreasonable search must be suppressed." Id. at 49, citing *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081; *AL Post 763 v. Ohio Liquor Control Comm.*, 82 Ohio St.3d 108, 1998-Ohio-367, 694 N.E.2d 905.

A. Consensual Encounter

{¶ 25} Det. Ovalle testified he approached the vehicle to determine if the tip CMHA received was accurate. He explained that he planned to engage the occupants in a consensual encounter. This is a common exception to the warrant requirement characterized by a citizen possessing a freedom of movement that allows them to stop the encounter simply by walking away. *U.S. v. Mendenhall* (1980), 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497. Consensual encounters do not implicate Fourth Amendment guarantees because there is no restraint of liberty. *State v. Scott* (Aug. 5, 1999),

Cuyahoga App. No. 74352, citing *Mendenhall*, supra. "Encounters between the police and a citizen are consensual where the police merely approach an individual in a public place, engage the person in conversation and request information. *Mendenhall* * * * at 553. There need be no objective justification for such an encounter. As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy and the protections of the Fourth Amendment are not implicated. Id. at 554." *State v. Brock* (Dec. 9, 1999), Cuyahoga App. No. 75168, *4.

{¶ 26} Appellant argued at the suppression hearing that Det. Ovalle could not investigate the tip without searching the vehicle and that, for the purpose of the Fourth Amendment, appellant was seized prior to the detectives seeing any drugs. The testimony adduced at the suppression hearing contradicts these arguments.

{¶ 27} First, appellant, Det. Azzano, and Det. Ovalle all testified that the detectives approached the vehicle in a public place without weapons drawn. Both detectives also testified that they did not block the vehicle from leaving the gas station prior to the discovery of drugs. Also, no command was issued by the detectives prior to their observation of drugs. It is clear from this testimony that appellant was not seized prior to the discovery of drugs within the vehicle. The detectives approached the vehicle in an

attempt to ask the occupants questions without seizing them. Therefore, this was a valid consensual encounter.

B. Plain View

{¶ 28} Both detectives stated that, upon seeing the drugs, they issued orders for the driver to turn off and exit the vehicle. These were the first orders issued, and this was the first time the occupants of the vehicle could be considered seized. Based on this testimony, the trial court did not err in denying appellant's motion to suppress.

{¶ 29} The plain view doctrine, expressly sanctioned by the Supreme Court in *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, "allows police officers, under particular circumstances, to seize an 'article of incriminating character' which is not described in their search warrant. The doctrine 'is grounded on the proposition that once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost * * *.'" *State v. Halczyszak* (1986), 25 Ohio St.3d 301, 303, 496 N.E.2d 925, quoting *Illinois v. Andreas* (1983), 463 U.S. 765, 103 S.Ct. 3319, 77 L.Ed.2d.

{¶ 30} "Where the initial intrusion that brings the police within plain view of such an article is supported, not by a warrant, but by one of the recognized exceptions to the warrant requirement, the seizure is also legitimate." *Coolidge* at 465. The factors that are necessary to envelop a seizure within this doctrine, as enunciated in *Coolidge*, are "[f]irst, the initial

intrusion that brought the police into a position to view the object must have been legitimate. Second, the police must have inadvertently discovered the object. Third, the incriminating nature of the object must have been immediately apparent." *Halczyszak* at 303, 496 N.E.2d 925. See, also, *Coolidge* at 468-471.

{¶ 31} The initial intrusion in this case, as explained above, was based on the consensual encounter exception to the warrant requirement. In *City of Mentor v. Olsen* (Nov. 17, 2000), Lake App. No. 99-L-170, police officers asked Olsen's permission to enter his home to use his telephone. Olsen argued this was a ruse to search. Olsen allowed the officers into his home to use the phone and, once inside, they discovered drug paraphernalia and marijuana out in the open. The court upheld the denial of Olsen's motion to suppress finding that "the question is simply whether the police arrived at the position from which they obtained a plain view of the evidence in a lawful manner. The testimony of both police officers indicated that Olsen agreed to let them use his telephone. * * * The police did enter and were then lawfully in a position to observe the evidence, which was in plain view."

{¶ 32} Similarly, appellant argues the detectives approached the vehicle with an intent to search it. The officers testified they were attempting to engage the occupants of the vehicle in a consensual encounter. This lawfully placed them in the area of the vehicle, where drugs were observed in plain view through the open window. Having found that the occupants of the

vehicle were not seized in violation of the Fourth Amendment, the first prong of *Coolidge* was satisfied.

{¶ 33} For the second prong of the *Coolidge* factors, the detectives must have inadvertently discovered the evidence. Detectives Azzano and Ovalle testified that they looked into the open driver's window and observed a large, clear plastic bag of a white crystalline substance. Det. Ovalle stated that he observed the bag on the floorboards of the car between the passenger's legs. Det. Azzano testified he observed the bag on top of the center console between the two passengers. While the testimony was conflicting as to the exact location the bag of crack cocaine was first observed, both detectives testified they observed a large bag of what they knew to be crack cocaine in plain view within the car before any search or seizure. This evidence was inadvertently discovered.

{¶ 34} For the final prong of the *Coolidge* factors, the detectives stated that they observed a large bag of what they knew to be crack cocaine based on their experience and expertise. The Ohio Supreme Court has held that "in ascertaining the required probable cause to satisfy the immediately apparent requirement, police may rely on their specialized knowledge, training and experience." *Halczyszak* at 307, 496 N.E.2d 925. Detectives Ovalle and Azzano were in the Crime Suppression Unit of the CMHA and had experience investigating drug activity in almost 1000 cases. Each detective explained

his experience in identifying crack cocaine, and each testified that he immediately knew the substance in the clear plastic bag to be crack cocaine.

{¶ 35} The detectives had probable cause to arrest appellant and stop the vehicle from leaving upon seeing the bag of crack cocaine. Although conflicting testimony exists as to exactly where the drugs were first observed and who was first to approach the car, the trial court properly determined that the consistent testimony met the burden of demonstrating that the detectives did not violate appellant's Fourth Amendment rights.

{¶ 36} Appellant also complains of conflicting testimony as to whether the tip received by CMHA was from an anonymous source or a known informant. Having found that the detectives initiated a consensual encounter, the nature of the tip is immaterial to the suppression of evidence.

C. Jurisdiction to Arrest

{¶ 37} Appellant also argues that the CMHA officers were outside of their jurisdiction because the arrest did not occur on CMHA property. Testimony was adduced that Detectives Ovalle and Azzano were duly sworn sheriff's deputies at the time of the arrest. Det. Ovalle produced an I.D. card stating as much. The trial court found that to be dispositive of the issue, but was willing to revisit the ruling at trial.

{¶ 38} R.C. 2935.03(A)(1) allows a peace officer to effectuate an arrest within his appointed territorial jurisdiction. A deputy sheriff's territorial jurisdiction is limited to the county in which that deputy has been elected or

appointed to perform his duties. See *In re Sulzman, Sheriff* (1932), 125 Ohio St. 594, 596, 183 N.E. 531. Therefore, since Detectives Ovalle and Azzano testified they were sworn deputy sheriffs at the time of the arrest, they had proper authority to arrest appellant within Cuyahoga county.

III. Return of Seized Property

{¶ 39} In appellant's third and a portion of his first assignments of error, he argues that the trial court erred when it failed to grant his motion for the return of seized property and "when it failed to address the return of the seized property aspect of the defendant's motion to suppress."

{¶ 40} The state argues appellant waived this argument by pleading no contest to possession of criminal tools and the forfeiture specifications included in the indictment. However, a plea of no contest does not preclude a defendant from raising, on appeal, any error by the trial court in denying a motion to suppress. Crim.R. 12(I). When a pretrial motion for the return of seized property is submitted to the trial court, the court is to treat it as a motion to suppress. *State v. Blackshaw* (May 29, 1997), Cuyahoga App. No. 70829; R.C. 2981.03(A)(4). Therefore, appellant did not waive the right to challenge the forfeiture of his property by pleading no contest.

{¶ 41} "The mere possession of cash is not unlawful. *State v. Golston* 66 Ohio App.3d 423, 431, 584 N.E.2d 1336. Therefore, in order to prove that the money is contraband, the State must have demonstrated that it is more probable than not, from all the circumstances, that the defendant used the

money in the commission of a criminal offense. *State v. Golston*, supra at 432, 584 N.E.2d 1336." *State v. Gales*, Cuyahoga App. No. 80449, 2002-Ohio-4420, ¶20.

{¶ 42} R.C. 2981.02(A) states that "[t]he following property is subject to forfeiture * * *:

{¶ 43} "* * *

{¶ 44} "(2) Proceeds derived from or acquired through the commission of an offense[.]

{¶ 45} "(3) An instrumentality that is used in or intended to be used in the commission or facilitation of [a felony offense] * * *."

{¶ 46} It is incumbent on the state to show that the property seized was either proceeds of or an instrumentality used to facilitate a drug offense. "This Court has previously found currency to be a criminal tool." *Blackshaw*, at *7. Also, "evidence the defendant knowingly transported, delivered or distributed drugs may be used by the jury to reasonably conclude that the [money] possessed by the defendant was 'used to facilitate * * * drug transactions and thus was a criminal tool,' such as for the purpose of providing any necessary change during drug sales, in violation of R.C. 2923.24." Id. at *8, quoting *State v. Reese* (Aug. 18, 1988), Cuyahoga App. No. 54105.

{¶ 47} Because appellant was charged with possession of criminal tools — namely money — in connection with his drug trafficking charge, the trial

court properly denied a motion for the return of the money because it was evidence of the possession of criminal tools charge to be resolved at trial and was properly seized by police, as found in appellant's first assignment of error above.

Allied Offenses

{¶ 48} Although not raised by either party, appellant was improperly convicted and sentenced for both drug possession and drug trafficking. R.C. 2941.25(A) provides that "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one." The Ohio Supreme Court has "held that drug possession under R.C. 2925.11(A) and drug trafficking under R.C. 2925.03(A)(2) were allied offenses." *State v. Seljan*, Cuyahoga App. No. 89845, 2009-Ohio-340, ¶7, citing *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, paragraph two of the syllabus.

{¶ 49} Even though the trial court sentenced appellant to concurrent terms for each conviction, "a defendant is prejudiced by having more convictions than are authorized by law." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶31. Further, a no contest plea does not relieve this court of its obligation to ensure that appellant's sentence is authorized by law. Id. at ¶26. Therefore, this case must be remanded to the trial court for resentencing where the state shall decide on which charge

appellant should be convicted and sentenced. *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, paragraph three of the syllabus.

Conclusion

{¶ 50} Appellant argues that the trial court's decision denying his motion to suppress must be overturned. However, this decision is supported in the record and was not an abuse of discretion. CMHA detectives were lawfully in a place to observe a large amount of crack cocaine next to appellant, in plain view. Therefore, appellant's arrest was supported by probable cause. The money found on appellant was also properly seized by the CMHA detectives because it was the basis for the charge of possession of criminal tools against appellant. However, the trial court erred when it found appellant guilty and sentenced him for two offenses that are allied; therefore, this case must be remanded to the trial court for resentencing.

{¶ 51} Conviction affirmed; cause reversed in part and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

KENNETH A. ROCCO, P.J., and
LARRY A. JONES, J., CONCUR